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In the Supreme Court of the United States

OCTOBER TERM, 1976

ROCCO MASTRANGELO AND JOSEPH ADDOLORIA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

SIDNEY M. GLAZER,
JAMES A. HUNOLT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on February 25, 1976. The petition for a writ of certiorari was filed on April 23, 1976, and is therefore untimely under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether three years' pre-accusation delay denied petitioners due process of law.

2. Whether the trial court erred in admitting evidence of other crimes.

3. Whether the trial court denied petitioners a fair trial by admonishing petitioner Mastrangelo's counsel not to misrepresent facts before the jury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of theft from a shipment moving in interstate commerce (Count 1), conspiracy to commit that theft (Count 2), and use of a firearm in the theft (Count 3), in violation of 18 U.S.C. 659, 371, and 924 (c)(1) and (2).[1] Petitioner Mastrangelo was sentenced to concurrent terms of seven and five years' imprisonment on Counts 1 and 2, respectively, with parole eligibility pursuant to 18 U.S.C. 4208(a)(2). A sentence of seven years' imprisonment on Count 3 was suspended in favor of five years' probation to follow the imprisonment. Petitioner Addoloria was sentenced to concurrent terms of nine and five years' imprisonment on Counts 1 and 2, respectively, with parole eligibility pursuant to 18 U.S.C. 4208(a)(2). A sentence of nine years' imprisonment on Count 3 was suspended in favor of five years' probation to follow the imprisonment. The court of appeals affirmed without opinion.

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[1]Five other defendants were charged in the indictment. Charles Peters, Gerard Collins and Paul Flammio pleaded guilty to use of a firearm during a theft from interstate commerce. Charles Forbes was convicted after a jury trial of conspiracy to commit the theft; his conviction is pending on appeal (C.A. 2, No. 76-1146). Gerald Barry pleaded guilty to a charge of being an accessory after the fact.

In related prosecutions, Paul Fleischer pleaded guilty to a charge of theft from interstate commerce. Gerald Allicino and Seymour Rosenwasser were convicted of receiving stolen goods and conspiracy; the latter's conviction is pending on appeal (C.A. 2, No. 76-1260). Soloman Broverman and Eugene Santore were convicted of receiving stolen goods and conspiracy. Broverman's conviction has been affirmed (C.A. 2, No. 76-1037, decided June 7, 1976). Lawrence Cesare pleaded guilty to possessing stolen goods.

In January 1972 petitioners and Paul Fleischer[2] joined a group organized by Charles Peters to hijack trucks (Tr. 72-74, 87-91). The group met almost daily to discuss plans (Tr. 94-97). They first stole merchandise belonging to the Lerner Shops from a truck at Kennedy Airport (Tr. 98, 101-102). In mid-February they stole a truckload of tools from the Royal Merchandise Company (Tr. 113). On March 3, 1972, they hijacked an Arlene Knitwear Company truck containing merchandise (Tr. 128, 135-137).[3] Petitioner Addoloria helped to break into the Arlene Knitwear truck; he and petitioner Mastrangelo helped to unload the merchandise from the truck (Tr. 142-143). In early May 1972, the group stole trucks containing goods being carted by the Liz Cartage Company (Tr. 193-200) and goods belonging to the Splendid Form Brassiere Company (Tr. 204-206, 210-211). The proceeds from the sale of the stolen goods were divided among the conspirators (Tr. 105-112, 173-174, 188-189).

Petitioner Mastrangelo denied planning or engaging in any hijacking (Tr. 1021, 1031, 1047-1048). He claimed he was unable to recall his whereabouts on March 3, 1972, the date of the Arlene Knitwear hijacking (Tr. 1021). Petitioner Addoloria presented no evidence (Tr. 1165).

ARGUMENT

1. Petitioners contend (Pet. 4-9) that the delay between their crimes in February 1972 and their indictment in April 1975 denied them due process of law. *United States* v. *Marion*, 404 U.S. 307, 324, indicated

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[2]Fleischer testified at trial on behalf of the prosecution.

[3]This theft is the basis for the substantive counts of the indictment.

that a denial of due process occurs only where pre-accusation delay results in actual prejudice to the conduct of the defense and is intentionally caused by the government to gain a tactical advantage. Although the courts of appeals are divided over whether both elements must be shown (see *infra*, pp. 5-6), petitioners have not shown either prejudice or prosecutorial overreaching.

Petitioner Mastrangelo asserts that he was prejudiced because he was unable to remember what he did on the day of the Arlene Knitwear hijacking. The defendant's faded memory alone, however, is insufficient to establish prejudice. *United States* v. *Jones*, 524 F. 2d 834, 843 (C.A. D.C.); *United States* v. *Zane*, 489 F. 2d 269 (C.A. 5), certiorari denied, 416 U.S. 959; *United States* v. *Broadway*, 477 F. 2d 991, 996 (C.A. 5); *United States* v. *Griffin*, 464 F. 2d 1352, 1354-1355 (C.A. 9), certiorari denied, 409 U.S. 1009. In any event, the case against petitioner Mastrangelo did not depend on the events of a single day; it reflected his participation in events that covered a span of months. Petitioner Mastrangelo has not alleged that he has forgotten all of his activities between January and May 1972. Moreover, petitioner Addoloria does not assert that *his* memory has faded, and he makes no claim of prejudice whatsoever.

Petitioners' assertion that the delay was a deliberate act by the prosecution to obtain a tactical advantage is groundless speculation. This claim is based on the fact that Fleischer, one of the conspirators and the prosecution's main witness, met in June 1972 with an agent of the Federal Bureau of Investigation after he and his family were threatened by defendant Peters (Tr. 256-264).

Fleischer gave the agent a statement concerning the prior hijackings (Tr. 273-274, 651)[4] and later acted as an informant (Tr. 264-268, 933). Petitioners urge that the delay between the beginning of Fleischer's cooperation and the return of the indictment gives rise to an inference of prosecutorial overreaching. But the evidence also showed that the investigation continued at least until mid-1974, when some of the stolen Arlene Knitwear goods were recovered (Tr. 710-713, 717-720). The government kept Fleischer's identity as an informant secret until 1975 (Tr. 933). It may be inferred from this that the delay resulted from the need for further investigation and to protect the informant until the investigation was complete.[5] Nothing in the record indicates an improper purpose for the delay.

The circuits are in conflict on the question whether, in addition to prejudice, intentional delay to obtain a tactical advantage also is necessary for dismissal of an indictment for pre-accusation delay. We are seeking review of this question in *United States* v. *Lovasco*, 532 F. 2d 59 (C.A. 8), petition for a writ of certiorari pending, No. 75-1844.[6] There is, however, no reason to defer ruling in the instant case. Petitioners' claim fails, whatever

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[4]The statement was not introduced into evidence, although it was used by petitioner Mastrangelo's counsel during his cross-examination of Fleischer (Tr. 651-654).

[5]The reason for the delay might have been revealed in greater detail if the federal agent who took Fleischer's statement had been questioned at trial (Tr. 915-918). Petitioner Mastrangelo's counsel specifically rejected that line of inquiry (Tr. 929).

[6]*Lovasco* is similar to *United States* v. *Barket*, 530 F. 2d 189 (C.A. 8), upon which petitioners rely (Pet. 8-9). But see *United States* v. *Naftalin*, 534 F. 2d 770 (C.A. 8) (four and one-half year pre-accusation delay is permissible in the absence of prejudice to defendants).

may be the ultimate ruling in *Lovasco*,[7] since the trial record does not establish either prejudice or intentional tactical delay.

2. Petitioners contend (Pet. 9-14) that evidence of prior and subsequent similar criminal acts was improperly admitted. But petitioners and five others were charged with conspiracy between January 1, 1972, and March 7, 1972, to hijack the Arlene Knitwear truck. The "other crime" evidence to which petitioners object was admissible to show the purpose and scope of the conspiracy. It also was admissible to show that the Arlene Knitwear hijacking was part of a unitary scheme, and that it had been prepared and carried out as part of an overall plan.[8] Fed. R. Evid. 404(b); *United States* v. *Carroll*, 510 F. 2d 507, 509 (C.A. 2); *United States* v. *Smith*, 504 F. 2d 560, 561 (C.A. 5); *United States* v. *Chrzanowski*, 502 F. 2d 573, 575 (C.A. 3); *United States* v. *Arias-Diaz*, 497 F. 2d 165, 170 (C.A. 5), certiorari denied, 420 U.S. 1003.[9]

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[7]Petitioners' reliance (Pet. 8-9) on *United States* v. *MacDonald*, 531 F. 2d 196 (C.A. 4), petition for a writ of certiorari pending, No. 75-1892, is misplaced. So far as it is relevant here, the decision in *MacDonald* dealt with the Speedy Trial Clause of the Sixth Amendment, which does not apply to pre-accusation delay. *United States* v. *Marion*, *supra*, 404 U.S. at 313-320.

[8]The jury was thoroughly instructed that the evidence of similar acts was admitted only to show plan, scheme, or design (Tr. 196, 199, 204, 1348-1349).

[9]The decision below is in accord with the rule in the Second Circuit. As that court observed in *United States* v. *Gerry*, 515 F. 2d 130, 141, certiorari denied, 423 U.S. 832:

> The rule in this Circuit as to prior criminal activity is in the inclusionary form and holds that evidence of other crimes is admissible except when offered solely to prove criminal character. [Citations omitted.]

See *United States* v. *Santiago*, 528 F. 2d 1130, 1134 (C.A. 2). Insofar as *United States* v. *DeCicco*, 435 F. 2d 478 (C.A. 2), upon which petitioners rely (Pet. 13-14), is inconsistent with these cases, it presents only an intra-circuit conflict that this Court need not address. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

3. Petitioners argue that they were denied a fair trial because the trial judge maintained a "hostile attitude" toward petitioner Mastrangelo's attorney, Eugene Mastropieri (Pet. 15-16). They point to the following admonition of the trial judge to the jury (Tr. 476):

> Now this is the second time Mr. Mastropieri has done this [implied a fact without basis] and I caution you that the fact that Mr. Mastropieri asks such a question does not indicate that there is any basis for it and indeed there was, apparently, no such basis in this case.
>
> You have to be careful. The fact that he asks a question that incorporates a fact does not mean it is true unless confirmed by the witness. Twice now this has happened by Mr. Mastropieri where he had no business asking the question.

The instruction was given during Mastropieri's cross-examination of Fleischer. After an objection the trial judge satisfied himself that the question had no basis (Tr. 474-475). The instruction was both restrained and necessary; it did not deprive petitioners of a fair trial.[10]

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[10]The district court's patience undoubtedly had been strained. Mr. Mastropieri persisted in asking Fleischer irrelevant, misleading, and factually groundless questions (Tr. 414, 416-419, 427, 453-454, 462, 474-475, 507, 509-510, 580, 595). He was warned by the trial judge on numerous occasions outside the presence of the jury to abstain from such conduct (Tr. 415-416, 429-436, 440-446, 475-476, 631-640, 675-676).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

SIDNEY M. GLAZER,
JAMES A. HUNOLT,
Attorneys.

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